BRIEF IN SUPPORT OF PETITION

OPINIONS

The opinion of the trial court was filed on April 4, 1943 (R. 30-39), which is reported in 52 Fed. Supp. 498. The opinion of the Circuit Court of Appeals was filed August 28, 1944 (R. 77-88). It has not been officially reported. No petition for rehearing was filed by the appellant, the petitioner herein. On September 26, 1944, the appellee, the respondent herein, filed petition for rehearing with supporting brief (R. 89-101). This petition was denied on October 7, 1944 (R. 102).

JURISDICTION

Petitioner seeks a review, by certiorari, of the judgment of the United States Circuit Court of Appeals for the Tenth Circuit, of August 28, 1944, under the provisions of Section 240 (a) of the Judicial Code as amended. [28 U. S. C. A. 347 (a)].

STATEMENT OF THE CASE

The case was tried in the trial court upon a written stipulation and the testimony of an officer of the petitioner. Upon this stipulation and the testimony of this witness the trial court prepared and filed Findings of Fact and Conclusions of Law (R. 39-44). These Findings of Fact and Conclusions of Law, the complaint of the petitioner (R. 1-5), the opinion of the trial court (R. 30-39), the

opinion of the Circuit Court of Appeals (R. 77-88), and the foregoing petition, give a fairly complete and accurate statement of the case and we here adopt them as such.

SPECIFICATIONS OF ERROR

(1) The Circuit Court of Appeals erred in holding that the petitioner sold its Commercial Flatwork service, between November, 1942, and March, 1943, in violation of the Emergency Price Control Act, as amended, and the Regulations promulgated thereunder, involved herein.

(2) The Circuit Court of Appeals erred in holding that the petitioner sold its Rental Linen and Flatwork services, between November, 1942, and March, 1943, in violation of said Act, as amended, and the Regulations promulgated thereunder, involved herein.

(3) The Circuit Court of Appeals erred in holding that the petitioner violated said Act, as amended, and the Regulations promulgated thereunder, involved herein, by eliminating the laundering of shirts from the Fluff Dry Bundle service and thereafter including shirts only in the All Finish Bundle service.

(4) The Circuit Court of Appeals erred in holding that the petitioner violated said Act, as amended, and the Regulations promulgated thereunder, involved herein, by discontinuing its discount of 20% to its Cash and Carry customers.

(5) The Circuit Court of Appeals erred in directing the trial court to make and enter a mandatory injunction in accordance with its opinion.

SUMMARY OF THE ARGUMENT

POINT I.

The business practice of the petitioner during the base period as to its Commercial Flatwork and Rental Linen services was a legitimate one. It did not sell these services after said base period in excess of the maximum charge for such services during said period.

POINT II.

The petitioner had the right to discontinue the laundering of shirts as a part of its Fluff Dry Bundle service and thereafter launder them in its All Finish Bundle service.

POINT III.

The petitioner had the right to discontinue its 20% discount practice as to its Cash and Carry customers.

POINT IV.

The Circuit Court erred in directing the trial court to make and enter a mandatory injunction in accordance with its opinion.

POINT V.

The Circuit Court has decided an important question of Federal law which has not been but should be settled by this Court under the rule applicable to non-conflict cases.

ARGUMENT

Point I.

The business practice of the petitioner during the base period as to its commercial flatwork and rental linen services was a legitimate one. It did not sell these services after said base period in excess of the maximum charge for such services during said period.

The Findings of Fact, as applied to the Commercial Flatwork and Rental Linen services, are:

"III.

"During March, 1942, the defendant sold a laundry service known as commercial flatwork service, consisting of laundering towels, napkins, aprons, and kindred articles for doctors, restaurants, small hotels and similar commercial customers, at prices ranging from 2¢ to 8¢ per pound. Between November, 1942, and March, 1943, the defendant increased its prices for commercial flatwork to some of its customers and because of increased operating costs resulting in part from the shortage and excessive turnover of labor caused by defendant's being restricted as to the wages it can lawfully pay, is now charging some of its customers for said service prices in excess of the prices

charged the same customers for said service in March 1942, and prior thereto, but in no case has defendant charged any customer more than 8¢ per pound.

"IV.

"During March, 1942, the defendant sold a service known as Rental Linen Service, consisting of furnishing the use of towels, napkins, aprons and kindred articles owned by the defendant at prices ranging from 55¢ per hundred to 85¢ per hundred for napkins, and 5¢ per pound to 8¢ per pound for flatwork. Between November, 1942, and March, 1943, the defendant increased its prices for said service to some of its customers, and because of the increased cost of materials and increased operating costs, is now charging none of its customers for said service prices in excess of the prices charged the same customers for said service in March, 1942, and prior thereto, but in no case has defendant charged more than 85¢ per hundred for napkins, and 8¢ per pound for flatwork.

"V.

"The different prices to different customers for commercial flatwork service and rental linen service were made and fixed by the defendant in part to meet the competition of other laundries and in part to obtain or hold the patronage of customers, or to regain the patronage of customers who had ceased to patronize the defendant and were obtaining commercial flatwork and rental linen service from competitors of the defendant.

"VI.

"The different prices for commercial flatwork service and rental linen service to different customers were the result of competition of competing laundries.

"VII.

"The commercial flatwork service furnished to each and all of the customers was the same and identical service.

"VIII.

"Then rental line service furnished to each and all customers was the same and identical service" (R. 40-41).

Section 1499.102 of Maximum Price Regulation No. 165, as amended, in part, provides:

"Sec. 1499.102 Maximum Prices for Services: General Provisions. Except as otherwise provided in Maximum Price Regulation No. 165, as amended, the seller's maximum price for any service to which this Maximum Price Regulation No. 165, as amended, is applicable shall be:

"(a) The highest price charged during March, 1942 (as defined in this section) by the seller—

"(1) For the same service; or * * *"

* * * * * * * *

"(e) Similar services subsequently sold. Any maximum price determined under paragraphs (c) and (d) of this Section 1499.103 shall be the maximum price for all services subsequently sold by the seller which are the same as or similar to the service for which a maximum price has been so determined, without regard to subsequent changes in cost. * * *.

"For the purposes of this Maximum Price Regulation No. 165, as amended, the highest price charged by a seller during March, 1942, shall be:

"(1) The highest price which the seller charged for a service 'supplied' by him during March, 1942; or * * *.

"The 'highest price charged during March, 1942,' shall be the highest price charged by the seller during such month to a 'purchaser of the same class.'

* * * * * * * *

"No seller shall evade any of the provisions of this Maximum Price Regulation No. 165, as amended, by changing his customary allowances, discounts, or other price differentials."

Section 1499.116 (10) of said Maximum Price Regulation entitled "Definitions and Explanations, provides:

"'Purchasers of the same class' refers to the practice adopted by the seller in setting different prices for services for sales to different purchasers or kinds of purchasers (for example, wholesaler, jobber, retailer, government agency, public institution, individual consumer) or for purchasers located in different areas or for different quantities or grades or under different conditions of sale."

During the base period as applied to these services the petitioner charged some customers less than it charged others for the same service as a means of meeting competition. All of the customers of these services were purchasers of the same class of service, and the petitioner has not, under the record, sold these services to any customer in excess of the maximum price during the base period, and the holding of the Circuit Court to the contrary is fundamentally wrong, in our judgment. The holding is apparently based upon a construction of the Administrator

as to the meaning of the Regulations as applied to laundry services. The following is quoted from this interpretation:

> " 'If a laundry customarily charged two customers different prices at the same time the two customers are in a separate class even if one customer sometimes paid more than the other and sometimes less.' "

Following this quotation the Court said:

> "In other words, the test is not necessarily whether customers were purchasing the same service in the same area during the same period of time, but whether the said purchasers were paying the same prices for the same services during the base period. With this construction we are in accord, and it follows that when the appellee sold 'rental linen service' and 'commercial flat work' to a particular customer or customers at a particular price, it thereby created a class within the meaning of the Regulation (1499.102), and by that Regulation it is forbidden to charge this class of customer or customers in excess of the maximum prices charged that class during the base period. When judged by these standards the appellee had admittedly violated the Regulation in respect to the 'rental linen service' and 'commercial flat work' " (R. 86).

As we understand the opinion of the Circuit Court, as applied to Commercial Flatwork service a 2¢ per pound sale would create a 2¢ per pound purchaser; a 3¢ per pound sale would create a 3¢ per pound purchaser; a 4¢ per pound sale would create a 4¢ per pound purchaser; a 5¢ per pound sale would create a 5¢ per pound purchaser, and so on up to 8¢ per pound. In other words, there would be eight separate and distinct classes of purchasers

of this service and the petitioner could not charge any of them in excess of the base period price respectively paid by them. We submit that the petitioner may sell this service for any price per pound not exceeding 8¢.

About the time this case was brought in the trial court the Administrator brought another action therein entitled, *Prentiss M. Brown, Administrator Office of Price Administration* v. *Oklahoma Operating Company*, No. 1229 Civil. This case was tried before Judge Broaddus, and involved, among other things, the Commercial Flatwork service involved here, and as to this service he held:

> "3. Classes of purchasers as used in Maximum Price Regulation No. 165 as amended are not created by the defendant in granting different prices to different customers for Commercial Flat Work service.
>
> "4. The defendant by furnishing Commercial Flat Work service to different customers at different prices has not violated Maximum Price Regulation No. 165 as amended.
>
> "5. The granting of different prices for Commercial Flat Work service to different customers based upon competition for the same character of service does not under Maximum Price Regulation No. 165, as amended, create classes of purchasers."

The aboe case has not been reported in Federal Supplement but may be found in CCH, War Law Service, 1 Price Control Cases, page 51067, paragraph 50962. The rule announced is:

> "Establishment by a laundry of different prices for identical commercial flat work service rendered dif-

ferent customers does not create 'classes of purchasers' in violation of PR 165 (Services) where the different prices were made and fixed because of competition from other laundries, but the increase of prices for finishing shirts with attached collars and cuffs in certain 'bundle services' above the maximum price constitutes a creation of classes of purchasers in violation of the Regulation."

The Administrator appealed from the judgment in this case to the Circuit Court of Appeals, but the appeal was dismissed by him before the submission thereof.

The interpretation by the Administrator of the Regulations promulgated by him is entitled to much consideration, but is not controlling upon the courts. In *Davies Warehouse Company* v. *Chester Bowles, Price Administrator,* —— U. S. ——, 88 L. Ed. Advance Sheet No. 7, page 379, this Court announced this rule:

> "6. An administrative construction of a statute which was no sooner made than challenged does not command the deference of the courts."

What we have said under this Point as to the Commercial Flatwork service applies with equal force to the Rental Linen service, and we respectfully submit that the petitioner did not violate said Act as amended, and the Regulations involved, and that the holding of the Circuit Court upon this particular point is fundamentally wrong.

Point II.

The petitioner had the right to discontinue the laundering of shirts as a part of its fluff dry bundle service and thereafter launder them in its all finish bundle service.

In July, 1943, the petitioner discontinued selling the Budget, Wet Wash and Thrifty Bundle services, being three of its five bundle services. During said month it also discontinued the finishing of shirts as a part of the Fluff Dry Bundle service, and thereupon it sold the service of finishing shirts with collars and cuffs attached only as a part of its All Finish Bundle service, and charged therefor a minimum of 15¢ for each shirt, and a maximum of 25¢ for plain and 35¢ for silk shirts. Under its All Finish Bundle service during said base period its lowest price for plain shirts was 10¢ and its maximum price was 25¢. On and after March 1, 1943, petitioner discontinued its minimum price of 10¢ for shirts in said bundle service (R. 25).

Judge Vaught, the trial judge, in discussing this phase of the case, said:

> "The whole controversy seems to be over the prices now charged by the defendant for services sold in finishing shirts with collars and cuffs attached and the prices charged for bundle service in excess of the prices charged in March, 1942. It will be observed that the deefndant now sells such services on shirts only in the 'all finish bundle.' In the services sold in March, 1942, in the 'all finish bundle,' the prices that could be charged, under the defendant's schedule of prices for the identical service, for shirts ranged

from 10¢ to 25¢ per shirt. The evidence discloses that the price range now is from 17¢ to 18¢ per shirt. The highest or ceiling price has not been exceeded" (R. 37).

The petitioner had the right to discontinue the three above-mentioned bundle services and eliminate the service of finishing shirts from its Fluff Dry Bundle and include them in its All Finish Bundle, and by so doing did not violate said Act, as amended, and the Regulations promulgated thereunder.

Point III.

The petitioner had the right to discontinue its 20% discount practice as to its cash and carry customers.

During March, 1942, and for approximately five or six months prior thereto, the petitioner allowed a discount of 20% to all of its Cash and Carry customers on the price of all laundry services for the performance of which three days or longer were allowed. This cash discount was discontinued by the petitioner in November, 1942, because of increased operating costs and the shortage and excessive turnover of labor, and the said discount is not at this time allowed by the petitioner. (Finding of Fact XIX, R. 43; Stipulation XIII, R. 26).

Mr. Denham, the official of the petitioner, testified with reference to this discount (R. 59-61).

Section 4 (d) of the Act [50 U. S. C. A., Appendix, Section 904 (d)], under the heading "Prohibitions," provides:

> "Nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent."

Under the above-quoted provision of said Act the aforesaid Finding of Fact and the evidence of Mr. Denham, the petitioner had the right, in our judgment, to discontinue this discount, and by so doing did not violate said Act, as amended, and the Regulations promulgated thereunder.

Point IV.

The Circuit Court erred in directing the trial court to make and enter a mandatory injunction in accordance with its opinion.

The provision of Section 205 (a) of the Emergency Price Control Act with reference to an injunction or other order is discretionary, and the judgment of the trial court denying an injunction was proper under the facts and circumstances presented by the record, in our judgment, and the Circuit Court erred in directing the trial court to enter a preliminary injunction.

—*Hecht Co.* v. *Bowles*, —— U. S. ——, 88 L. Ed. Advance Sheet No. 9, page 465.

Point V.

The Circuit Court has decided an important question of Federal law which has not been but should be settled by this Court under the rule applicable to non-conflict cases.

The Tenth Circuit is the only Circuit dealing with the questions involved here, and we do not have a case of conflict of decision, so far as our investigation goes. This Court has many times granted certiorari in non-conflict cases as applied to the construction of Federal Acts. We reiterate Paragraph V of the foregoing petition, and submit that under the rule as applied to non-conflict cases this Court should grant the petition.

Respectfully submitted,

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